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No. 88-170



In the Supreme Court of the United States

OCTOBER TERM, 1988

MARY DANGERFIELD BENGIVENGA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner should have received *Miranda* warnings before being questioned by a Border Patrol officer.

2. Whether petitioner's act of producing her baggage claim stubs in response to the officer's request was testimonial for purposes of the Fifth Amendment privilege against compulsory self-incrimination.



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OPINIONS BELOW

The opinion of the three-judge panel of the court of appeals (Pet. App. 34a-39a) is reported at 811 F.2d 853. The opinion of the en banc court of appeals (Pet. App. 1a-33a) is reported at 845 F.2d 593.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1988. The petition for a writ of certiorari was filed on July 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing 24 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

She was sentenced to four years' imprisonment and a five-year special parole term. A divided panel of the court of appeals reversed the conviction. The en banc court of appeals overturned the panel opinion and reinstated the conviction.

1. Shortly after midnight on February 1, 1986, a bus arrived at a fixed border checkpoint located seven miles south of Falfurrias, Texas. Border Patrol Agent Samuel Santana boarded the bus for a routine inquiry into the citizenship of each of the 10 to 15 passengers who were aboard. Two of the passengers, petitioner and her companion Dolly Gore, told Agent Santana that they were destined for Alice, Texas. Pet. App. 2a-3a, 42a.

Following that inquiry, Agent Santana left the bus to examine the luggage bins for illegal aliens. He found no one hiding there, but he detected the odor of marijuana emanating from three similar suitcases in the front compartment. Agent Santana called Agent Guillermo Ramos to the luggage bin area, and Agent Ramos agreed that the odor was that of marijuana. The agents then removed the suitcases from the luggage bin, examined the baggage claim tags affixed to the suitcases, and determined that the suitcases were bound for Alice. Throughout their inspection, the agent saw petitioner and Gore peering nervously out the bus window. Pet. App. 3a, 43a.

Santana told Ramos that those two women were the only passengers who had said that they were going to Alice. Agent Ramos then entered the bus. He first spoke with two men sitting in front of petitioner and Gore and learned that they were traveling to San Antonio. Agent Ramos then asked the women their destination and was told that they were going to Alice. Agent Ramos asked if either had any luggage checked in the bins. They denied having any checked luggage. Pet. App. 3a, 43a.

Agent Ramos then asked petitioner and Gore to step off the bus, a routine procedure that avoids embarrassment to suspects and protects other passengers. Outside the bus, Agent Ramos pointed to the three suitcases guarded by Agent Santana and asked if either petitioner or Gore owned them; both denied ownership. Agents Ramos and Santana carried the luggage into the checkpoint trailer (a converted mobile home) and asked petitioner and Gore to step inside. Inside the trailer, Agent Santana began to fill out a baggage receipt form for the bus driver, who was also inside drinking coffee. Agent Ramos again asked the women whether they owned the suitcases, and the women nervously denied owning them. Agent Ramos then asked petitioner and Gore if he could see their bus tickets. He checked Gore's ticket and found that it was in order. When petitioner opened the envelope containing her ticket, Agent Ramos noticed that three baggage claim stubs were attached to it. He asked to see the stubs and also asked whether they belonged to petitioner. Petitioner replied that she did not know how they came to be there. After matching the stubs to the three suitcases, Agent Ramos arrested petitioner and Gore, advised them of their *Miranda* rights, and opened the luggage. He found about 55 pounds of marijuana inside the suitcases. About a minute and a half elapsed between the time that petitioner and Gore had entered the trailer and the time of their arrest. Pet. App. 3a-4a.

2. Before trial, petitioner moved to suppress her statements to the agents, her bus ticket, the baggage claim stubs, and the marijuana. She claimed that she was in custody when she entered the trailer and therefore should have been given *Miranda* warnings before being questioned. After a hearing, the district court denied the motion. The court ruled that petitioner was not in custody

while she was in the trailer and therefore was not entitled to *Miranda* warnings. Pet. App. 46a-47a.

3. The court of appeals reversed by a divided vote. Pet. App. 34a-39a. Applying a four-part test then prevailing in that circuit for determining whether a person is in custody for purposes of *Miranda*,¹ the majority concluded that petitioner was in custody because there was probable cause to arrest her and because the investigation had begun to focus on her. *Id.* at 38a. The majority therefore ordered the suppression of petitioner's "answers to the questions and the production of her ticket and baggage claim stubs." *Ibid.* The dissenting judge concluded that petitioner was not in custody because Agent Ramos lacked probable cause to arrest her. *Id.* at 39a.

4. After rehearing the case, the en banc court of appeals overturned the panel decision and reinstated the conviction. Pet. App. 1a-20a. At the outset, the majority (which included the author of the panel opinion) abandoned the four-part test previously used by the circuit to determine whether a person is in custody under *Miranda*, on the ground that that test was inconsistent with this Court's precedents, particularly *Berkemer v. McCarty*, 468 U.S. 420 (1984). Pet. App. 7a-11a. Employing the "reasonable person" standard adopted in *Berkemer*, the court found that petitioner was not in custody when she was interviewed in the trailer and therefore was not entitled to *Miranda* warnings before questioning. *Id.* at 12a-17a. In addition, the court held that, even if petitioner was entitled *Miranda* warnings, the proper remedy for

¹ The Fifth Circuit's test required a court to consider (1) whether there was probable cause to arrest the person who was questioned; (2) whether the officer subjectively intended to restrain that person; (3) whether that person subjectively believed that his freedom was significantly restrained; and (4) whether the investigation had begun to focus on that person. Pet. App. 37a.

that violation would not include the suppression of petitioner's bus ticket and baggage claim stubs, since those items were nontestimonial evidence. *Id.* at 17a-20a.

The dissenting judges agreed that the Fifth Circuit's prevailing test for custody was inconsistent with this Court's precedents and therefore had to be discarded. Pet. App. 21a. They believed, however, that petitioner was in custody from the moment that she entered the trailer. *Id.* at 27a-30a. The dissenters also believed that petitioner's act of producing her bus ticket and the baggage stubs was testimonial and therefore protected by the Fifth Amendment privilege against compulsory self-incrimination. *Id.* at 31a-33a.

ARGUMENT

Petitioner contends that she should have received *Miranda* warnings before being questioned in the checkpoint trailer and that her statements, her bus ticket and baggage claim stubs, and her act of producing those items should have been suppressed at trial. The en banc court of appeals correctly rejected those claims, and its fact-bound ruling does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by the Court is not warranted.

1. It is well settled that *Miranda* warnings must be given to a person before questioning only if he is "in custody," and a person is not "in custody" under *Miranda* unless he is subjected to a " 'formal arrest or restraint on [his] freedom of movement of the degree associated with a formal arrest.' " *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)); accord *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); *New York v. Quarles*, 467 U.S. 649, 655 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 430-431

(1984). Moreover, that inquiry must be answered by determining how a reasonable person in the suspect's position would have understood his situation. *Berkemer v. McCarty*, 468 U.S. at 442. Finally, a person need not be given *Miranda* warnings during a *Terry* stop when he is briefly detained for investigative purposes. *Id.* at 440.

Petitioner does not quarrel with any of those principles. Instead, she argues only that she was in custody when she entered the trailer, for the reasons given by the dissenting judges below. Petitioner and the dissenting judges rely largely on the fact that she was questioned in a nearby trailer, rather than on the bus. That fact, however, did not convert the investigative detention of petitioner into an arrest, because the circumstances under which she was questioned were not equivalent to a formal arrest.

Petitioner was not told that she was under arrest, she was not handcuffed or physically restrained, and Agent Ramos did not use or threaten to use force against her in any way. The scene inside the trailer also was not intimidating. There were no jail cells and no overwhelming presence of uniformed and armed police officers; there were only the two Border patrol officers, petitioner and her companion, and the bus driver, who was innocuously enjoying a cup of coffee. The bus driver's presence underscored the informality of the setting and made petitioner aware that she had not lost access to her means of transportation in the event that the agents became satisfied that she was not connected to the incriminating suitcases. In addition, Agent Ramos asked petitioner and Gore only a few questions during an encounter that lasted no more than 90 seconds before petitioner was placed under arrest. During that interval, only three events occurred that affected petitioner: when asked about the suitcases, she denied that they belonged to her; when asked to produce

her bus ticket, she displayed an envelope containing the ticket and baggage claim checks; and when asked about the baggage checks, she professed not to know how they came to be attached to her bus ticket. None of those circumstances converted what was to that point a non-custodial setting into a custodial one. Finally, the fact that the agents had seized petitioner's luggage is immaterial, because petitioner had disclaimed any ownership interest in the three bags.

In sum, the scene inside the trailer was a far cry from the one that prompted this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), to demand that a suspect be told about his rights to silence and counsel before being questioned. The district court found that "[t]here was no evidence of coercion, rough treatment, or other factors which would indicate that the intrusion on the right of personal security of [petitioner] was more than minimal" (Pet. App. 45a), and petitioner does not claim that that finding is clearly erroneous. Under these circumstances, the fact that petitioner was questioned in a nearby trailer office was not sufficiently coercive to render the questioning custodial in nature. See *California v. Beheler, supra*, and *Oregon v. Mathiason, supra* (holding that *Miranda* warnings were not required even though the suspect was questioned at a police station); cf. *United States v. Mendenhall*, 446 U.S. 544, 557-558 (1980) (asking a suspect at an airport to accompany narcotics agents to their airport office does not necessarily amount to an arrest).

The dissenting judges below concluded that "the character of the questioning changed as soon as [petitioner] was moved from the area outside the bus to the checkpoint trailer" (Pet. App. 29a), since the questioning was not public, petitioner was not driving her own car, and she was not free to leave at the close of questioning.

Id. at 27a. None of those factors, however, was sufficient to render the interview custodial. First, even if the interview did not take place in public, petitioner was not alone with the officers, since the bus driver was also in the trailer. Moreover, in *Minnesota v. Murphy*, *supra*, this Court rejected the claim that questioning is inherently coercive if there are no observers to guard against police abuse or trickery (see 465 U.S. at 432-433 (questioning of a probationer by his probation officer)), and in *Beheler* and *Mathiason* this Court found that *Miranda* warnings were unnecessary even though the suspect was questioned at a police stationhouse. Second, the fact that petitioner was traveling by bus rather than in her own car did not render the detention coercive, since the bus had not left. Finally, the fact that petitioner was not free to leave at the end of Agent Ramos's questioning because she was arrested is irrelevant to the inquiry whether the preceding events were custodial. Otherwise, every arrest would retroactively render a person in custody even in the absence of any preceding coercion.

Even if petitioner was in custody while she was in the trailer, the appropriate remedy would have been to suppress the statements petitioner made, not physical evidence such as the baggage claim stubs and the bus ticket. See *Oregon v. Elstad*, 470 U.S. 298 (1985) (*Miranda* does not require suppression of derivative evidence); *New York v. Quarles*, 467 U.S. at 665-672 (opinion of O'Connor, J.) (*Miranda* does not require suppression of physical evidence). As the en banc court of appeals correctly held (Pet. App. 18a), the bus ticket and baggage claim stubs amounted to "real" or "physical" evidence, rather than evidence of a "communicative" nature. The Fifth Amendment would not require the exclusion of those items, even if petitioner were compelled to hand them over, because

the Amendment does not protect against the compulsory production of physical evidence. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (blood sample); see generally *Doe v. United States*, No. 86-1753 (June 22, 1988), slip op. 9 (collecting cases). Moreover, the only statements that petitioner made while she was in the trailer were her repeated denials that the suitcases were hers. Those utterances were cumulative to the identical statements that petitioner made before she entered the trailer, and petitioner does not claim that her earlier statements were inadmissible. Under these circumstances, any error in the admission of the statements petitioner made in the trailer was harmless.

2. There is also no merit to petitioner's claim that her act of producing her bus ticket and baggage claim stubs was testimonial, and that those two items and her act of producing them should have been excluded at trial. Unlike the Fourth Amendment protection against unreasonable searches and seizures, the Fifth Amendment privilege against compulsory self-incrimination is not, as a general rule, self-executing. Instead, a person must invoke the privilege when faced with compulsion, or the privilege will be deemed to have been waived. *Minnesota v. Murphy*, 465 U.S. at 427-429. The only exception to that rule potentially applicable here is the case of custodial police interrogation. *Id.* at 429-434. Petitioner, however, was not "in custody" when she was questioned inside the office, as explained above. Accordingly, petitioner's failure to object to Agent Ramos's request to see her bus ticket amounted to a waiver of any contention that the act of producing that ticket and the baggage claim stubs violated the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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